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Introductory Remarks to the Conference

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INTRODUCTORY REMARKS TO THE CONFERENCE

NATHAN M. CRYSTAL* AND GREGORY B. ADAMS**

When the Center for Law, the Legal Profession, and Public Policy was formed in 1991, the Governing Board began debating the scholarly direction of the Center. We were interested in identifying a topic of importance to various segments of the profession. From these discussions emerged the idea of a conference on the commercialization of the legal profession.

The title of the conference may suggest that commercialization is something new to the profession and that commercialization is a state to be deplored and avoided if possible. As organizers of the conference, we mean neither. The profession has always had business and commercial aspects and will continue to do so long as the practice of law is a means of earning a living. Nor do we think that commercialization is an undesirable state. To the extent that commercialization refers to increased markets and greater competition among providers of legal services, it may well benefit consumers in terms of greater access to legal services at reduced costs.

And yet, we think it is fair to say that the current debate about commercialization does have some new elements not found in the past. We also think that some basis exists for concern that the commercial aspects of the profession may be producing undesirable results. In preparing for this conference, we reviewed some of the literature on commercialization and professionalism. It seems to us that two themes in the literature stood out as capturing central aspects of the current debate regarding professionalism.

First, lawyers now face the reality that they are actors in a competitive market for legal services, with all of the competitive pressures other market actors face. While it may be true that the practice of law has always had commercial aspects, we believe that the subjection of law firms and lawyers to market forces to the extent now taking place is quite new. In a 1989 study of the legal profession, Professor Richard Abel argued that the focus of much of the organized efforts of the legal profession (like other professions) during the late nineteenth century and into the twentieth century has been on controlling its market by regulating access to the profession, production of legal services, and demand for those services.¹ If that has been a primary goal of the legal profession, the profession surely has failed. A variety of factors have made professional control of the legal-services market impossible.

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1. See RICHARD L. ABEL, *AMERICAN LAWYERS* (1989).

These factors include Supreme Court decisions allowing lawyers to engage in advertising and direct mail solicitation, a commercial and entrepreneurial ethic in the 1980s affecting lawyers and law firms as well as the general business community, an increasing supply of lawyers, growing competition by nonlawyer providers of legal services, and the growth of in-house counsel and other corporate controls on the cost of legal services.

Second, the profession seems deeply troubled by a concern about loss of professional autonomy. This, of course, is not unique to the legal profession. Many doctors complain bitterly of the loss of professional independence and discretion that government and private regulation have caused in their profession. Concern with the loss of professional independence, like concerns about professionalism, are not new, but the context for those current concerns is different. Particularly important in this regard, we believe, is the dramatic increase in the number of lawsuits brought against lawyers for legal malpractice, securities fraud, and breach of regulatory obligations.

These forces have operated both on large firms and on sole practitioners, but in somewhat different ways. As we began researching for this essay, we decided that we would split up the area, both of us looking at the general literature; Nathan then focused on large firms and Greg the sole practitioners and small firms. It seemed to us that although Greg's segment of the bar was much larger than Nathan's, it would probably work out to be a fairly fair division of labor. Were we wrong.

Virtually nothing has been written in this area about small firms and sole practitioners. The seventy-eight percent of the bar that practices in that setting has more or less escaped serious scholarly inquiry. Oh, there have been a few things written; probably the best are Heinz & Laumann's 1982 study of Chicago lawyers,² which crosses the entire spectrum of the profession in a large city, and Donald Landon's 1990 examination of country lawyers.³ Before those we have to go back to the 1960s to find studies of lawyers in Chicago, Detroit, New York City, and one unnamed city of 80,000 people.⁴ However, only one of those studies, Jerome Carlin's 1962 study of sole practitioners in Chicago,⁵ focused on the mainstream of the practicing bar. Although obviously the studies of country lawyers and small-town lawyers deal primarily with lawyers who do not practice in large firms, interestingly these sources do not deal with the issues of commercialization or the future of the

2. JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1982).

3. DONALD D. LANDON, COUNTRY LAWYERS: THE IMPACT OF CONTEXT ON PROFESSIONAL PRACTICE (1990).

4. JOEL F. HANDLER, THE LAWYER AND HIS COMMUNITY: THE PRACTICING BAR IN A MIDDLE-SIZED CITY (1967).

5. JEROME E. CARLIN, LAWYERS ON THEIR OWN: A STUDY OF INDIVIDUAL PRACTITIONERS IN CHICAGO (1962).

practice of law, although there are some works on narrow topics like advertising.

Most of the writing focusing on sole practitioners in small firms is found in the "how-to" bar publications, articles, and manuals produced by various bar organizations. In other words, our bibliographical research shows that the field is ripe for scholarly fact-based research. That is one of the reasons it is so auspicious that there are a number of people at this conference who are sole practitioners or come from small firms or have experience as sole practitioners or small firms. That will be an important focus of the next two days' discussions.

One of the most thought-provoking analyses of the future of small-firm and sole practice and how the commercialization/professionalism issue affects them, is Jim Dimitriou's paper for the conference. He makes a number of insightful points that we will discuss tomorrow about the huge gaps in the scholarly literature, including the tendency to analyze firm size without reference to locale as if a small firm or a sole practitioner in a rural area were the same sort of organization as one in a large city. He also raises the issue of the reduction in partnership opportunities in the large firms and the impact it will likely have on small firms and sole practice. Other questions beg for serious attention, such as the impact of technology and specialization on small firms and sole practitioners. Careful and thorough studies of the mainstream of the American bar seem overdue. Perhaps this conference and the Center can serve as catalysts for such studies.

During the next two days we will have an opportunity to explore these themes and other issues in much more detail. We look forward to participating in these discussions.

